As a Market Manager, the petitioner was given the most difficult and problematic market with the highest turnover rate. Despite a lack of support from Strong, he consistently performed under budget and within two years he had completely turned around his market, making over $2 million in net profit over and above his budget, something not even Strong had done when he was the Market Manager of this particular market.

Throughout his tenure as a member of 7-Eleven's management team between 1992 and 2002, the petitioner had to endure a culture of bias and hostility toward him and other employees who were foreign-born or of foreign descent. Management members, especially another Market Manager with whom the petitioner shared office space, would ridicule their accents, their clothing, their personal hygiene and mannerisms. Between 2000 and 2002, the petitioner went to Strong on at least seven occasions to complain about this hostile work environment. Yet Strong did nothing and the mocking and ridicule of the petitioner and other employees who were foreign born or of foreign descent continued.

In January of 2003, a 7-Eleven employee of foreign ethnicity or race who had filed a sexual harassment claim against one of her superiors approached the petitioner for help with a transfer. When the petitioner's involvement in the transfer process became known, management denied the employee a transfer, chastised the employee for contacting the petitioner for help and the petitioner himself was reported to upper management, including Strong, for his attempt to help this employee.

In February of 2003, the petitioner recommended three Store Managers of foreign birth to become

franchisees of stores in his market area. They took pre-tests with 7-Eleven measuring their ability to run the stores as franchisees and scored very high. Yet all three, on the orders of Strong, were disqualified from taking the final exam without notifying the petitioner, a procedure against 7-Eleven's established protocol.

When the petitioner asked Strong about his actions and then claimed that disqualifying these Store Managers of foreign birth from taking the final exam to become franchisees was unfair discrimination, Strong replied that the petitioner had crossed the line, that he speaks out too much for "people like that" and that the petitioner would "pay for it."

On February 26, 2003, *less than two weeks after advocating against 7-Eleven's racial and ethnic discrimination of these non-white Store Managers and less than two months after advocating for the transfer of a non-white employee complaining of sexual harassment*, Strong made good on his threat and informed the petitioner that there had been yet another "reorganization" of the Division and, as a result, the petitioner's position of Market Manager had been eliminated. Strong offered him the choice of either separating entirely from 7-Eleven with a severance package of about $30,000 or he could accept a demotion *three* levels to the position of Field Consultant. The petitioner was given 48 hours to make a decision.

Strong later revealed that the petitioner's market had not really been eliminated by the "reorganization;" instead, a different market in Virginia had been eliminated, a market run by one Larry Bullis, a much younger Caucasian/American who had once left 7-Eleven

and was Strong's friend. However, because Strong wrongly claimed that the petitioner had the least tenure among all Market Managers, he was being removed from his market and being replaced with Bullis.

Having worked for 7-Eleven for seventeen (17) years and two years from retirement, the petitioner faced a demotion to Field Consultant which would have made him subordinate to his former subordinates (his position before Market Manager was Senior Field Consultant) and reduced his pay grade to level 22. Moreover, the demotion would reduce his salary as a Market Manager of $85,000 which together with a bonus of $30,000 totaled $115,000, to just $61,000, a reduction of almost 50%. Petitioner's attempt to seek help from upper management in order to resolve this problem was ignored or frustrated. The petitioner decided to leave the company. Within a week, Bullis took over the petitioner's position of Market Manager. *Of the Division's 7,500 employees, only the petitioner lost his job to this claimed "reorganization" by 7-Eleven.*

On July 8, 2003, the petitioner, alleging most of these facts, brought this employment discrimination suit under 42 U.S.C. Section 1981, against 7-Eleven in the Circuit Court for Prince George's County, Maryland, seeking damages for racial discrimination, retaliation, hostile work environment and constructive discharge(App.3-4;8). Once removed to the federal district court in Maryland, the matter came on for decision on the parties' cross motions for summary judgment. On December 17, 2004, the District Court, Williams, J., without a hearing, issued his decision granting 7-Eleven's summary judgment motion and denying the petitioner's cross motion for the same relief (App.3-24).

After recounting some of the petitioner's work history with 7-Eleven, the district judge adopted 7-Eleven's disputed claim that Strong's "reorganization" of the Chesapeake Division which resulted in the petitioner's demotion to Field Consultant on February 26, 2003, began *not* in the immediate aftermath of the petitioner's protected activity earlier that month and year but rather started to be formulated by Strong in October of 2002(App.6). He believed Strong's story that in order to maximize "cost savings," he wanted to have a Senior Field Consultant for each Market Manager; that 7-Eleven's "guidelines" require that a Market Manager must have ten or more Field Consultants before a Senior Field Consultant could be hired for that market; and that since most of the twelve Market Managers had less than ten Field Consultants, Strong needed to eliminate two markets and consolidate them with the remaining ten markets in order to qualify each of these remaining markets for a Senior Field Consultant(*id.*).

The district judge further believed 7-Eleven's claim that even though Strong had been "contemplating" this change since October of 2002, he "decided not to reorganize immediately," instead waiting until January of 2003 when one of his twelve Market Managers announced his retirement(*id.*). As the motion judge found, "[b]ased in large part on [the Market Manager's] decision to retire, Strong decided to downsize the Chesapeake Division from twelve markets to ten markets"(*id.*). Because Strong claimed that the petitioner was the least senior Market Manager, his position was eliminated(App.6-7).

The district court then found that "[d]uring the entire course of his employment with [7-Eleven], [the petitioner] was subjected to a hostile work environment

based on his race," recounting the petitioner's evidence of his co-workers' negative and racially derogatory comments about him and other employees of foreign birth or of foreign descent(App.7-8).

Upon these found facts, the district judge applied this Court's three-part burden shifting test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973), to conclude that while the petitioner presented a *prima facie* case of discriminatory failure to promote, 7-Eleven had carried its burden of showing that its serial rejections of the petitioner's promotion to Market Manager were based upon the qualifications of the competing applicants, a legitimate, nondiscriminatory rationale which the petitioner could not persuasively rebut(App.9-12).

As for the claim that 7-Eleven's "cost saving" "reorganization" was racially motivated in order to eliminate petitioner as a Market Manager, the district court ruled that the petitioner had not even presented a *prima facie* case of discrimination(App.12-14). Relying on performance ratings produced by 7-Eleven, it determined that none of the other Market Managers at the time of the reorganization were performing at a lower level than petitioner and that, in any event, since Strong hired petitioner and later eliminated his position "by citing reasonable business concerns," a *prima facie* case of discrimination had not been made out(App.12-14).

As for discriminatory retaliation, the district court erroneously assumed that the elimination of the petitioner's Market Manager's position took place in March of 2004 *when, in fact, it occurred on February 26, 2003, less than two weeks after the petitioner advocated against 7-Eleven's racial and ethnic discrimination of*

certain non-white Store Managers, less than two months after he advocated for the transfer of a non-white employee complaining of sexual harassment and less than two weeks after Strong's threat that the petitioner would "pay for" these protected activities (App.15-16;23). Upon this fundamental mistake of fact, it saw an insufficient temporal nexus between the petitioner's protected activity and the adverse employment action to present a *prima facie* claim of discriminatory retaliation(App.15-16).

Nor did the district court consider the admitted serial racial harassment of the petitioner by his co-workers sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment(App.16-19). Finally, it rejected the claim that 7-Eleven's 3-grade demotion of petitioner, a 50% cut in pay and a reduction in responsibility from 70 to just 7 stores amounted to his constructive discharge(App.20-21). First, it termed the pay cut as 28%, *not* 50%, and therefore not such a loss in pay which would compel a reasonable person to resign; and second, it concluded that while the petitioner, in his mid-fifties and nearing retirement, was now reduced to just a Field Consultant, it was reasonable for him to believe that there was still the possibility that Strong (who engineered his demotion) might someday promote him to Senior Filed Consultant or even Market Manager(App.21).

Upon the petitioner's appeal, the Court of Appeals for the Fourth Circuit unanimously affirmed the district court in an unpublished *per curiam* opinion on September 13, 2005(App.1-2). On November 1, 2005, the Court of Appeals denied the petitioner's timely filed petition for rehearing and rehearing *en banc*(App.25).

REASONS FOR GRANTING THE PETITION

1. The Decision Below Misapplied the *McDonnell Douglas* Framework of Proof And Denied The Petitioner A Fair Hearing On His *Prima Facie* Claim That 7-Eleven Discriminated Against Him When Its "Reorganization" Targeted Only His Position As Market Manager For Elimination Out Of 7,500 Employees Within The Division.

In *McDonnell Douglas* and subsequent cases, this Court has "established an allocation of the burden of production and an order for the presentation of proof in...discriminatory treatment cases." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142(2000) quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506(1993). First, the petitioner had to establish a *prima facie* case of discrimination. *Id. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253(1981). The term "*prima facie* case" was used by this Court to denote the establishment of a legally mandatory, rebuttable presumption. *Burdine*, 450 U.S. at 254 n.7. As explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577(1978), the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.*

If the petitioner proves unlawful disparate treatment by a preponderance of the evidence, he has established his *prima facie* case which creates the presumption that the employer has unlawfully discriminated against him, proof which, if believed by a trier of fact and if the employer is silent in the face of that presumption, would warrant a judgment for the

petitioner because no issue of fact remains in the case. *Burdine*, 450 U.S. at 254. Under *McDonnell Douglas*, the employer is then given the opportunity to rebut the petitioner's *prima facie* case by producing evidence that the adverse employment action was taken against him for a legitimate, nondiscriminatory purpose. *Reeves*, *supra*. *Burdine*, *supra*. *McDonnell Douglas*, 411 U.S. at 802. It is a burden of production, not persuasion, and involves no credibility assessment. *Id.* quoting *Burdine*, *supra* and citing *Hicks*, 509 U.S. at 509.

If the employer successfully carries its burden in this regard, the presumption of discrimination—but *not* the petitioner's evidence in support of this presumption—disappears, the sole remaining issue becomes discrimination *vel non* and the petitioner must then be afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were not its true reasons but were a pretext for discrimination. *Reeves*, 530 U.S. at 143 citing *Hicks*, 509 U.S. at 507-508. That is, aided by the same proof which established his *prima facie* case, the petitioner may attempt to establish that he was the victim of intentional discrimination by showing that a discriminatory reason more likely motivated the employer, *Burdine*, 450 U.S. at 256, or that its presumptively valid reasons for disparate treatment "were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. See *Hicks*, 509 U.S. at 510.

Under the *McDonnell Douglas* framework, the petitioner's initial burden of establishing a *prima facie* case of disparate treatment is "not onerous." *Patterson v. McLean Credit Union*, 491 U.S. 164, 186(1989). *Burdine*, 450 U.S. at 253. See *Hicks*, 509 U.S. at 504-505(approving

of the "minimal requirements of...a *prima facie* case").While the *McDonnell Douglas* Court listed four discrete elements to the plaintiff's *prima facie* case of discriminatory rehiring practices challenged there, the Court made clear in a footnote that "[t]he facts necessarily will vary in Title VII [or 42 U.S.C. Section 1981] cases, and the specifications...of the *prima facie* proof required from [the plaintiff there] is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.

The typical *prima facie* showing of disparate treatment in the hiring, firing, demotion or promotion of employees will focus on (1) the status of the plaintiff as a member of a protected group; (2) his qualified status or that he was meeting his employer's expectations; (3) an adverse employment action; and (4) following the adverse employment action, his replacement by someone in an unprotected class. *Patterson*, 491 U.S. at 186-187. *Burdine*, 450 U.S. at 253. *McDonnell Douglas, supra.*

However, when an employer such as 7-Eleven "reorganizes" its Division so that *only one position—the petitioner's position as a Market Manager--is eliminated* not on the basis of performance but rather due to the reorganization itself, the flexible standard of proof for a *prima facie* case of disparate treatment described in *McDonnell Douglas* is triggered. In these circumstances, the petitioner's initial *prima facie* case of disparate treatment must show that (1) he was a member of a protected class; (2) he and his Market were meeting his employer's legitimate expectations; (3) the "reorganization" selected *only the petitioner*'s position for elimination; and (4) his Market was then given to someone in an unprotected class.

The petitioner made such a *prima facie* showing. His summary judgment materials proved that he was a 55-year-old male of South Asian descent who during his 17-year tenure had endured two prior demotions *not* for performance issues but due to company "reorganizations." His record was stellar and he possessed outstanding endorsements from his Supervisors for promotion at every level. Yet it was only after 7-Eleven's refusal to promote him to Market Manager *seven* times and after his explicit threat to bring a discrimination lawsuit that 7-Eleven decided that he deserved the promotion.

Given the most difficult Market with the highest turnover rate, the petitioner performed under budget and within two years turned his Market around, making over $2 million in net profit, something not even Strong had done when he was the Market Manager of this Market. However, his performance meant little to Strong as Division Manager when the petitioner advocated for certain non-white fellow employees in mid-February of 2003. As Strong saw it, the petitioner had now crossed the line, speaking out too much for "people like that," and he promised that the petitioner would "pay for it."

On February 26, 2003, less than two weeks after advocating against 7-Eleven's racial and ethnic discrimination of certain non-white employees and less than two months after advocating for the transfer of a non-white employee complaining of sexual harassment, Strong made good on his promise, informing the petitioner of yet another "reorganization" of the Division which eliminated the petitioner's position of Market Manager. Strong offered him either a severance package of about $30,000 or a demotion *three* levels to the position of Field Consultant.

Strong later revealed that the petitioner's Market had not actually been eliminated by the "reorganization." Instead, a different Market in Virginia had been eliminated, one run by Larry Bullis, a much younger Caucasian/American who was Strong's friend. Bullis replaced the petitioner as the Market Manager for the petitioner's Market. Of the Division's 7,500 employees, only the petitioner lost his job to this claimed "reorganization."

All of this proof, which should have been taken as true by the district judge, met the petitioner's "not onerous" initial burden under the *McDonnell Douglas* framework of showing by a preponderance of the evidence that 7-Eleven's "reorganization" of its Division was intentional discrimination, a targeted downsizing affecting just one non-white employee out of 7,500. Yet the district court, relying upon *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1314-1315(4th Cir. 1993), ruled that in order for the petitioner to state a *prima facie* case of discriminatory reorganization, he had to show that he was *performing* at a level substantially equivalent to the lowest level of those in the group retained and that the process of selection by the employer produced a residual workforce containing some unprotected persons who were *performing* at a lower level than the petitioner (App.12-13). It then resorted to 7-Eleven's specious, untimely performance evaluations of the petitioner to conclude that at the time of the reorganization, no member of the residual workforce was performing at a lower level than petitioner(App.12-13).

This approach wrongly applied *Mitchell's* requirements to this case, misapplied the *McDonnell Douglas* framework of proof and denied the petitioner a

fair hearing on his claim of discriminatory reorganization. First, *Mitchell* and the case it relied upon (*Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1417-1418(4th Cir.1991)) both address age discrimination challenges to company reorganizations made for *admittedly legitimate business reasons* which none of the plaintiffs there questioned. See 12 F.3d at 1313; 928 F.2d at 1418. Here, on the other hand, the petitioner is challenging as discriminatory 7-Eleven's very decision to reorganize, i.e., that it was carried out as a pretext to force the petitioner out of the company. Second, in both these cases, the stated criterion for the employer's selection of employees for discharge was *employee performance*. 12 F.3d at 1316; 928 F.2d at 1418. Here employee performance has nothing to do with 7-Eleven's decision to reorganize, the challenged discriminatory act.

Because of this misapplied law, the district court wrongly imported into its assessment of whether the petitioner had stated a *prima facie* claim of discriminatory reorganization 7-Eleven's irrelevant (and concocted) performance evaluations of the petitioner and the other Market Managers; and it emphasized the fact that Strong had hired the petitioner and then eliminated his position "citing reasonable business concerns"(App.12-13). Whether 7-Eleven had "reasonable business concerns" for its reorganization or whether it was a discriminatory act intended to punish the petitioner remains a genuine, unresolved issue of material fact on this record and the motion judge was wrong to rule otherwise. Moreover, by permitting 7-Eleven's evidence to control its assessment of whether the petitioner's evidence had stated a *prima facie* case of discriminatory reorganization, the district judge violated the *McDonnell Douglas* principles which entitled the petitioner in the

first instance to have his evidence, *standing alone*, considered by the court without reference to any self-serving explanations offered by the employer.

The matter is made more clear when it is considered that 7-Eleven was the party first moving for summary judgment. As the *Reeves* Court made clear, the district judge in reviewing the materials before it must draw all inferences in favor of the nonmoving party, the petitioner, and it may not make any credibility determinations because this is a function of a jury, not a judge. 530 U.S. at 150-151 citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255(1986). Thus while the court should review the record as a whole, it must disregard all evidence favorable to the moving party that a jury is not required to believe. *Id.* at 151. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested parties.'" *Id.* quoting 9A C. Wright & A. Miller, Federal Practice and Procedure, Section 2529, p.300(2d ed.1995).

Contrary to this law, the district court in ruling on the motions believed and adopted 7-Eleven's story that Strong's unwritten "reorganization" plan leading to the petitioner's demotion was actually hatched in October of 2002 for legitimate business reasons instead of in February of 2003 in the wake of his threat to make the petitioner pay for his protected activity of advocating for the rights of non-white employees. Even more damaging, the lower court brought this belief of Strong's story into its assessment of the petitioner's evidence in support of his *prima facie* case of discriminatory reorganization, nullifying his rights under the *McDonnell Douglas*

framework, denying him a fair hearing on this claim and justifying the grant of a writ of certiorari by this Court.

2. The Lower Courts' Egregious Mistake Of Fact About When The Petitioner's Position of Market Manager Was Eliminated By 7-Eleven Nullified His Valid Claim of Retaliatory Discrimination Under 42 U.S.C. Section 1981.

It is undisputed on this record that on February 26, 2003, less than two weeks after advo-cating against 7-Eleven's racial and ethnic discrimination of non-white Store Managers and less than two months after advocating for the transfer of a non-white employee complaining of sexual harassment, Strong made good on his threat to make the petitioner "pay for" speaking out on their behalf and informed him that there had been yet another "reorganization" of the Division and, as a result, the petitioner's position of Market Manager had been eliminated.

Yet the district judge inexplicably found that the petitioner's job was eliminated in *March of 2004*, one year later, and then concluded as a matter of law that because the petitioner's protected activity in advocating for certain non-white employees occurred "approximately one year prior to the elimination of [his] Market Manager's position," the causal connection between this protected activity and the adverse employment action was insufficient to state a claim for retaliatory discrimination(App.15).

However, where an adverse employment action takes place "soon after" the employee's protected activity, *Oliver v. Digital Equip. Corp.*, 846 F.2d 103,

110(1st Cir. 1988), "just after" the employee advocated for the rights of a co-employee, *E.E.O.C. v. Navy Federal Credit Union*, 424 F.3d 397, 408(4th Cir.2005), within one and one-half months of such activity, *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179(10th Cir. 1999), or even within four months of the employee's protected activity, see *Carter v. Ball*, 33 F.3d 450, 460(4th Cir. 1994), the inference is strongly suggestive that the adverse employment action is retaliatory and therefore actionable. *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 115(2nd Cir. 1987). The motion judge's fundamental misapprehension about when the petitioner's position was eliminated deprived the petitioner of the legitimate inference which his evidence deserved, i.e., that 7-Eleven through Strong eliminated the petitioner's position in immediate retaliation for his protected activities and in the direct wake of Strong's direct threat to make the petitioner "pay for" his advocacy of 7-Eleven's non-white employees.

This factual mistake by the district court nullifies completely the petitioner's valid claim of retaliatory discrimination under 42 U.S.C. Section 1981 and invokes this Court's power of superintendency over the inferior federal courts to correct such fundamental error and provide federal litigants their day in court on valid claims.

3. The District Court Improperly Diluted The Severity Of The Petitioner's Demotion And Wrongly Denied His Constructive Discharge Claim.

Having worked enthusiastically for 7-Eleven for seventeen (17) years and two years from retirement, having now endured three reorganizations, two other

humiliating demotions and seven consecutive denials of promotion to Market Manager, the petitioner now faced a demotion to Field Consultant which would have made him subordinate to his former subordinates (his position before Market Manager was Senior Field Consultant) and reduced his pay grade to level 22. Moreover, this demotion reduced his supervisory responsibilities from 70 to just 7 stores and reduced his salary as a Market Manager of $85,000 which together with a bonus of $30,000 totaled $115,000, to just $61,000, a reduction of almost 50%. Yet the district court determined that the petitioner would only suffer a 28% reduction in pay and that he could look forward to Strong promoting him once again to either a Senior Field Consultant or even Market Manager(App.21).

The gist of a claim for constructive discharge is a deliberate effort by the employer to make the employee quit by making his working conditions intolerable. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141(2004). *Bristow v. Daily Press, Inc.*, 770 F. 2d 1251, 1255(4th Cir.1985). Constructive discharge may also be an adverse employment action in violation of 42 U.S.C. Section 1981, when "the record discloses that it was in retaliation for the employee's exercise of rights protected by the Act." *Munday v. Waste Management of North America, Inc.*,126 F.3d 239, 243(4th Cir. 1997) quoting *Holsey v. Armour & Co.*, 743 F.2d 199, 209(4th Cir. 1984), *cert. denied*, 470 U.S. 1028(1985). The crucial inquiry is whether the working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Suders, supra.*

While a "*slight* decrease in pay coupled with some loss of supervisory responsibilities" is insufficient

evidence of constructive discharge, *Jurgens v. EEOC*, 903 F.2d 386, 392(5th Cir.1990) (emphasis supplied), where the petitioner suffered almost a 50% loss of pay and a 90% loss in supervisory responsibility, a cognizable claim of constructive discharge has been made out because any reasonable person in the petitioner's position would have felt compelled to resign rather than face this humiliating, career-ending demotion.

The district court's computation of salary loss is inexplicable. The bonus attached to the Market Manager's position is pegged on performance and is an expected part of 7-Eleven's salary scheme. It should have been included by the motion judge in computing the petitioner's loss of salary. See *United States v. Lewis*, 340 U.S. 590, 591(1951); *Burnet v. Hamel*, 287 U.S. 103, 111(1932).

By unfairly diminishing the extent of the petitioner's decrease in pay and ignoring the dramatic loss of his supervisory responsibilities, the district court unfairly diluted the severity of the petitioner's demotion and made a rational assessment of his constructive discharge claim impossible on this record. The district court's characterization of this demotion as a "temporary setback" (App. 21) belies the petitioner's proof and warrants the granting of a writ of certiorari in order to correct this unjust result.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit and, ultimately, to vacate the judgment and remand the matter to the District Court for renewed discovery and a

trial on the merits of the petitioner's claims that 7-Eleven has discriminated against him in the workplace by reason of his race/ethnicity or provide the petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 05-1075

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHIM S. SHEIKH,
Plaintiff - Appellant,

Versus

7-ELEVEN,
Defendant - Appellee.

July 29, 2005, Submitted

September 13, 2005, Decided

NOTICE: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: Anne J. A. Gbenjo, THE GBENJO LAW GROUP, Houston, Texas; Jo Ann P. Myles, LAW OFFICE OF JO ANN P. MYLES, Largo, Maryland, for Appellant.

Eric A. Welter, WELTER LAW FIRM, P.C., Herndon, Virginia, for Appellee.

JUDGES: Before WILKINSON and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION: PER CURIAM:

Chim S. Sheikh appeals the district court's order granting summary judgment for 7-Eleven, Inc. and dismissing his claims of employment discrimination. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Sheikh v. 7-Eleven, 2004 U.S. Dist. LEXIS 28845, No. CA-03-2270-AW (D. Md. Dec. 17, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Civil Action No. AW-03-2270

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
SOUTHERN DIVISION

CHIM S. SHEIKH,
Plaintiff,

v.

7-ELEVEN, INC.,
Defendant.

December 17, 2004, Decided
December 17, 2004, Filed

COUNSEL: For Chim S. Sheikh, Plaintiff: Anne J A Gbenjo, The Gbenjo Law Group, Houston, TX.

For 7-Eleven Inc., Defendant: Eric Anthony Welter, Welter Law Firm PC, Herndon, VA; Marc Steven Levine, Handler and Levine LLC, Bethesda, MD.

JUDGES: Alexander Williams, Jr., United States District Judge.

OPINION BY: Alexander Williams, Jr.

OPINION:

MEMORANDUM OPINION

This action involves a Title VII employment discrimination suit brought by Chim S. Sheikh

("Sheikh" or "Plaintiff") against 7-Eleven, Inc. ("7-Eleven" or "Defendant"). Plaintiff alleges that, during his term of employment with 7-Eleven, he was discriminated against, demoted, subjected to a hostile work environment, and constructively discharged, all in violation of Title VII. Currently pending before the Court is Defendant's Motion for Summary Judgment [50] and Plaintiff's Cross-Motion for Summary Judgment [68]. The Court has reviewed the entire record, as well as the Pleadings with respect to the instant motion. No hearing is deemed necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated below, the Court will grant Defendant's Motion for Summary Judgment.

I. FACTUAL & PROCEDURAL BACKGROUND

In 1985, Sheikh, a male of South Asian descent, was hired by 7-Eleven as a Manger Trainee in Dallas, Texas. In 1988, Sheikh relocated to the Washington, D.C. area, and began working as a Supervisor in Montgomery County, Maryland. In 1992, Plaintiff held the position of Field Consultant in the Chesapeake Division.

7-Eleven owns, operates, and franchises food stores. 7-Eleven's stores are located throughout the United States and are divided into regional "Divisions." The 7-Eleven stores in the Washington, D.C. metro area fall within the "Chesapeake Division." At the head of the Chesapeake Division is a Division Manager. The Division Manager supervises the Market Managers, who are each responsible for approximately 70 stores. The Market Managers supervise the Field Consultants, each of whom has seven to nine stores under their

control. Beneath the Field Consultants are the Store Mangers, who run the 7-Eleven stores on a daily basis.

In January 1999, 7-Eleven posted a vacancy for a Market Manager for Market 2543, located in the Chesapeake Division. At the time, the Division Manager of the Chesapeake Division was Joseph Strong ("Strong"). Strong interviewed four candidates for the Market Manager position: Sheikh, Sharon Trow, Paul Yanon, and Troy McWilliams ("McWilliams"). Strong selected McWilliams for the Market Manager position. At the time of the Market Manager interview, McWilliams was a Grade Level 25 Fresh Food Merchandiser. Plaintiff was a Grade Level 23 Field Consultant.

In January 2000, 7-Eleven posted a vacancy for a Market Manager for Market 2581, also located in the Chesapeake Division. Strong interviewed three candidates for the Market Manager position: Sheikh, Clyde Johnson, and Phil Rapson ("Rapson"). Strong selected Rapson for the Market Manager position. At the time of the interview, Rapson was a Grade Level 24 Retail Information Systems Manager. Sheikh was a Grade Level 23 Field Consultant.

In October 2000, Sheikh applied for an open Market Manager position for Chesapeake Market 2543. In January 2001, Sheikh was selected for the Market Manager position. Pursuant to company guidelines, Sheikh was promoted from a Grade Level 23 to a Grade Level 24 when he became a Market Manager, and one year later, was promoted to a Grade Level 25. Strong was Sheikh's direct supervisor during Sheikh's time as a Market Manager.

In October 2002, Strong began contemplating a reorganization of the Chesapeake Division. In order to maximize cost savings, Strong wanted to create larger markets, and install a developmental Senior Field Consultant under each Market Manager. 7-Eleven's guidelines require that a Market Manager must have ten or more Field Consultants in order for the Division Manager to hire a Senior Field Consultant for that market. In October 2002, the Chesapeake Division contained twelve markets, each run by a Market Manager. Most of these Market Managers had fewer than ten Field Consultants. Therefore, in order to qualify his markets to hire Senior Field Consultants, Strong needed to eliminate two markets and consolidate those markets with the remaining ten markets. Strong decided not to reorganize immediately, as a reorganization would require Strong to eliminate two Market Manager positions.

In January 2003, Buddy Behringer ("Behringer"), the Market Manager for Prince William County, Virginia, announced his retirement. Based in large part on Behringer's decision to retire, Strong decided to downsize the Chesapeake Division from twelve markets to ten markets. As of March 1, 2003, there were eleven individuals employed as Market Managers in the Chesapeake Division. The tenure and the most recent performance evaluation of these individuals was as follows:

NAME	Months in Market Manager Position	Performance [1]Rating
Riaz Vaziralli	159	I
Arthur Temblay	134	I
Phillip Bradner	127	M

NAME	Months in Market Manager Position	Performance [1]Rating
David Erbe	126	I
Patrick Siefert	104	M
Stephen Tusing	80	I
Larry Bullis	58	I/M
John Patrick	55	I
Troy McWilliams	50	M
Phillip Rapson	35	M
Chim Sheikh	26	M

7-Eleven states that it decided to eliminate Sheikh's Market Manager position based upon the fact that Sheikh was the least senior of all of the Market Managers. Strong told Sheikh that his position had been eliminated, and gave Sheikh the option to stay with the company as a Field Consultant or to accept a severance package.[2] Sheikh declined these options and decided to leave the company. Sheikh left the company in February 2003; the effective date of his termination was March 6, 2003.

During the entire course of his employment with Defendant, Plaintiff was subjected to a hostile work environment based on his race. Plaintiff explains that several employees, and McWilliams in particular, would regularly make negative and racially derogatory comments regarding employees of foreign descent. Plaintiff points to four specific comments as evidence of this hostile work environment: (1) McWilliams stated that "these foreign borns are coming out of the woodworks [sic] to apply for franchise [sic] in my market"; (2) Brenda Duiguid, a Field Consultant, stated that "all my managers are foreign born and these foreign born managers do not accept me because in

their culture or religion, a woman cannot take a position over a male"; (3) McWilliams stated that foreign-born employees come to the United States without any money and then turn around and demand an increased salary; (4) McWilliams made comments about the personal hygiene of foreign-born employees such as "this guy hasn't changed his turban or his shirt for a week and he stinks."

On July 8, 2003, Plaintiff filed the instant suit, alleging four counts of employment discrimination. Specifically, Plaintiff's allegations are as follows: Count I -- Race Discrimination; Count II -- Retaliation; Count III -- Hostile Work Environment; Count IV -- Constructive Discharge. On March 12, 2004, Defendant filed a Motion for Summary Judgment. On May 25, 2004, Plaintiff filed a Cross-Motion for Summary Judgment.

II. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 214 (4th Cir. 1993)*; *Etefia v. East Baltimore Comm. Corp., 2 F.Supp.2d 751, 756 (D. Md. 1998)*. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (quoting

Fed.R.Civ.P. 1). The court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine, 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)* (internal citations omitted). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc., 152 F.3d 326, 330-31 (4th Cir. 1998)*; *Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)*.

III. ANALYSIS

A. Count I -- Race Discrimination

Plaintiff argues that Defendant unlawfully discriminated against Plaintiff based on his race by (1) failing to promote Plaintiff to the position of Market Manager and (2) reorganizing the Chesapeake Division to eliminate Plaintiff's Market Manager position.

A plaintiff lacking direct evidence of race discrimination may utilize the three-part burden shifting test outlined in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. *See Price v. Thompson, 380 F.3d 209, 212 (4th Cir. 2004)*. Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination, whereupon the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the action. *McDonnell Douglas, 411 U.S. at 802*. The plaintiff may then rebut the employer's proffer by proving by a preponderance of the evidence that the

employer's legitimate non-discriminatory reason is actually a pretext for discrimination. *Id. at 804*. A plaintiff can prove pretext by showing that the employer's explanation is "unworthy of credence," or by offering other forms of circumstantial evidence sufficiently probative of retaliation. *Id.*

1. Discriminatory Failure to Promote

In order to establish a *prima facie* case of race discrimination based on Defendant's failure to promote Plaintiff to the Market Manager position, Plaintiff must prove that: (1) Plaintiff is a member of a protected class; (2) there was an open Market Manager position for which Plaintiff applied; (3) Plaintiff was qualified for the position; and (4) Plaintiff was rejected under circumstances giving rise to an inference of unlawful discrimination. *Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1129 (4th Cir. 1995).*

Defendant does not dispute that Sheikh can establish a *prima facie* case of discriminatory failure to promote. Therefore, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason as to why Sheikh was not promoted to the position of Market Manager. *McDonnell Douglas, 411 U.S. at 802.*

Defendant states that Sheikh was not promoted to the position of Market Manager because the persons who received the Market Manager positions were more qualified than Sheikh. Therefore, Defendant has articulated a legitimate nondiscriminatory basis for its decision. *Patterson v. McLean Credit Union, 491 U.S. 164, 170, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989); Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994)*

The burden thus shifts back to Plaintiff to prove that Defendant's legitimate nondiscriminatory reason is

a pretext for discrimination. To demonstrate pretext, Plaintiff must offer more than merely his substantiated belief that he was discriminated against. *See McCain v. Waste Mgmt., 115 F.Supp.2d 568, 574 (D. Md. 2000)* (stating that to survive summary judgment, a "plaintiff must present admissible evidence that is more than self-serving opinions or speculation"). Here, Plaintiff offers no evidence that Defendant's failure to hire Plaintiff as a Market Manager was the product of discriminatory intent. Indeed, the Court notes that, once Plaintiff gained more experience with the company, Plaintiff was subsequently hired as a Market Manager by Defendant. Plaintiff's subjective and unsupported belief that he was discriminated against is insufficient to overcome Defendant's legitimate, non-discriminatory rationale.

Additionally, Defendant presents ample evidence to support its argument that Sheikh was not the most qualified of the Market Manager applicants. Specifically, in 1999, Defendant hired McWilliams for the Market Manager position rather than Sheikh. McWilliams was a Grade Level 25 employee, and possessed relevant experience as a Fresh Food Merchandiser. Sheikh was a Grade Level 23 Field Consultant. Therefore, McWilliams was hired because, by virtue of his experience, he was more qualified for the position than was Sheikh. Similarly, in 2000, Defendant hired Rapson for the Market Manager position over Sheikh. Rapson had worked for the prior two years as a Grade Level 24 Retail Information Systems Manager. Sheikh, in contrast, was a Grade Level 23 Field Consultant. Again, Defendant chose to hire the applicant with the greater amount of experience. For these reasons, the Court finds that

Plaintiff has failed to demonstrate that Defendant's legitimate non-discriminatory reason is actually a pretext for discrimination. Therefore, Plaintiff's claim of discriminatory failure to promote fails.

2. Discriminatory Reorganization

In order to establish a *prima facie* case of race discrimination based on Defendant's elimination of Plaintiff's Market Manager position, Plaintiff must prove that: (1) Plaintiff is a member of a protected class; (2) Plaintiff was selected for discharge; (3) Plaintiff was performing at a level substantially equivalent to the lowest level of those of the group retained; and (4) the process of selection produced a residual work force of persons in the group containing some unprotected persons who were performing at a lower level than that at which Plaintiff was performing. *Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315 (4th Cir. 1993).*

Defendant argues that Plaintiff cannot demonstrate the fourth element of a *prima facie* case of discrimination -- that the process of selection produced a residual work force that contained persons who were performing at a lower level than was Plaintiff. At the time of the elimination of Plaintiff's Market Manager position, Plaintiff's most recent performance evaluation was an "M," denoting "meets requirements." All of the Market Managers who remained after Plaintiff's position was eliminated received either a "M" or an "I," denoting "improves business," in their performance evaluations. As such, Defendant argues that none of the remaining Market Managers were performing at a lower level than Plaintiff at the time that his position was eliminated.

Plaintiff presents allegorical evidence of positive reviews and feedback he received in the past concerning his job performances throughout his tenure with Defendant. Plaintiff also expresses his personal opinion that he was performing at a higher level than others of the remaining Market Managers.

The Fourth Circuit has emphasized that, in assessing the qualifications of job applicants, a plaintiff's own opinions and conclusory allegations do not have sufficient probative force to reflect a genuine issue of material fact. *Goldberg v. B. Green & Co., Inc., 836 F.2d 845, 848 (4th Cir. 1988).* Rather, "it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 960-61 (4th Cir. 1996).* Here, Plaintiff presents no evidence that, at the time of the reorganization, Defendant perceived Plaintiff to be performing at a higher level than any of the other Market Managers.

The Court also notes that the circumstances attending the elimination of Plaintiff's position suggest that discrimination was not in play. Specifically, the Fourth Circuit has stated that, where an employee was hired and fired by the same person within a relatively short time span, a strong inference is raised that the employer's reasons for acting against the employee are not pretextual. *Jiminez v. Mary Washington College, 57 F.3d 369, 378 (4th Cir. 1995).* In this case, from January 2001 until March 2003, Strong hired Plaintiff as a Market Manager, twice increased Plaintiff's pay, and then eliminated his position citing reasonable business concerns. The probability of discrimination under this scenario is thus reduced.

For all of these reasons, the Court finds that Plaintiff cannot demonstrate that Defendant's process of selection produced a residual work force of persons any of whom were performing at a lower level than that at which Plaintiff was performing. As such, Plaintiff has not established a *prima facie* case of discriminatory reorganization.

B. Count II -- Retaliation

Plaintiff alleges that Defendant unlawfully eliminated his Market Manager position in retaliation for Plaintiff's advocacy of employees of foreign descent. To sustain a *prima facie* case of retaliatory discrimination, Plaintiff must demonstrate that: (1) Plaintiff engaged in a protected activity; (2) Defendant took adverse employment action against Plaintiff; and (3) a causal connection existed between the protected activity and the adverse employment action. *Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998).*

Plaintiff points to two different incidents as "protected activity": (1) in March 2000, Plaintiff complained to Strong that Plaintiff was denied a promotion to the Market Manager position because of discrimination; and (2) in early 2003, Plaintiff advocated on behalf of several employees of foreign descent.

The Fourth Circuit has held that, for purposes of demonstrating a *prima facie* case of retaliation, a causal connection exists where the employer takes adverse employment action against an employee "shortly after learning of the protected activity." *Price v. Thompson, 380 F.3d 209, 213 (4th Cir. 2004).* In general, "the passage of time . . . tends to negate the inference of discrimination." *Id.; Dowe v. Total Action Against Poverty, 145 F.3d 653, 657 (4th Cir. 1998)* ("A lengthy

time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two."). Moreover, where temporal proximity is the only evidence of causality, the temporal proximity must be "very close." *Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001)* (citing with approval a Tenth Circuit case finding three-month period insufficient to establish a causal connection).

Defendant concedes that Plaintiff's March 2000 complaint to Strong is protected activity. Nevertheless, Defendant argues that there is no causal connection between the complaint and the adverse employment action taken against Plaintiff. The Court agrees. Defendant eliminated Plaintiff's Market Manager position in March 2004. As such, lacking any other evidence suggesting a connection, Plaintiff's March 2000 complaint is too remote in time from the March 2004 reorganization for Plaintiff to establish a causal connection between the two events. *See Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998)* (thirteen month interval too long to establish causal connection).

Plaintiff's other protected activity occurred in early 2003, approximately one year prior to the elimination of Plaintiff's Market Manager position.[3] The Court doubts the causal connection between this protected activity and the adverse employment action, given the relatively long time period between the two incidents as well as the lack of additional evidence indicating a relationship between the two events. Moreover, Plaintiff offers no evidence that Defendant's legitimate reason for eliminating Plaintiff's position was pretext for retaliation. As discussed previously, Defendant

presents evidence that the decision to eliminate a Market Manager position was a reasonable business decision. Additionally, Plaintiff's position was selected for elimination because Plaintiff had the least tenure of any of the Market Managers, and was not performing at a level above the remaining Market Managers. Plaintiff presents no evidence beyond his own opinions that Defendant's true motivation was one of retaliation. For all of these reasons, Plaintiff's claim of discriminatory retaliation fails.

C. Count III -- Hostile Work Environment

In order to establish a *prima facie* case of hostile work environment based on race, Plaintiff must prove that the harassment was: (1) unwelcome; (2) based on Plaintiff's race; (3) sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive work environment; and (4) imputable to Defendant. *Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331 (4th Cir. 2003)* (en banc); *Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998).* In considering the severity and pervasiveness of the harassment, courts should consider the following factors: (1) the frequency of the harassment; (2) the severity of the harassment; (3) whether the harassment was physically threatening or merely offensive utterances; and (4) whether the harassment unreasonably interferes with the employee's work performance. *Smith v. First Union Nat'l. Bank, 202 F.3d 234, 242 (4th Cir. 2000).*

Employers may avoid strict liability for a supervisor's harassment where no adverse employment action was taken against the employee and the employer can demonstrate that (1) the employer exercised reasonable care to prevent and correct

promptly any harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).*

Plaintiff's allegations of hostile work environment can be divided into two categories: his allegations concerning the time period 1985 until 2001 and his allegations concerning the time period January 2001 until March 2003, when Plaintiff served as a Market Manager.

With regard to Plaintiff's pre-2001 allegations, Defendant argues that the affirmative defense articulated in *Faragher* shields Defendant from liability. The Fourth Circuit has found that distribution of an anti-harassment policy provides "compelling proof" that an employer exercised reasonable care to prevent and correct promptly any harassing behavior. *Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001).* Here, Defendant has an anti-harassment policy, the substance of which Defendant distributed to its employees. Additionally, Plaintiff made no complaints concerning any harassing behavior by other employees prior to January 2001, and in doing so unreasonably failed to take advantage of Defendant's clearly articulated anti-discrimination policy. Therefore, the Court finds that the *Faragher* affirmative defense is applicable to Plaintiff's pre-2001 harassment allegations.

Considering Plaintiff's post-2001 harassment allegations,[4] Plaintiff fails to demonstrate a *prima facie* case of hostile work environment. The bulk of Plaintiff's harassment allegations concern comments made by

McWilliams regarding foreign-born employees.[5] Plaintiff argues that McWilliams routinely insulted and mocked foreign-born employees. Specifically, Plaintiff alleges that the following derogatory comments were made: (1) McWilliams stated that "these foreign borns are coming out of the woodworks [sic] to apply for franchise [sic] in my market"; (2) Brenda Duiguid, a Field Consultant, stated that "all my managers are foreign born and these foreign born managers do not accept me because in their culture or religion, a woman cannot take a position over a male"; (3) McWilliams stated that foreign-born employees come to the United States without any money and then turn around and demand an increased salary; (4) McWilliams made comments about the personal hygiene of foreign-born employees such as "this guy hasn't changed his turban or his shirt for a week and he stinks." Plaintiff alleges that these statements were characteristic of the types of derogatory statements McWilliams would often make regarding foreign-born employees.

The Court finds that the harassment by McWilliams was not sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive work environment. First, Plaintiff admits that the harassment did not interfere with his work performance. Second, McWilliams' comments, while offensive and insulting, never came close to being physically threatening. Third, and perhaps most important, the comments occurred on a less than regular basis. Over the several year period that Plaintiff identifies as when the harassment by McWilliams occurred, Plaintiff can point to only a handful of specific discriminatory comments. Indeed, Van Lear testified that McWilliams made derogatory

comments about foreign-born employees approximately once a month. Such sporadic insults fall far short of the standard of frequent and pervasive harassment.

While the Court sympathizes with the plight of any employee forced to endure racially derogatory comments made by a fellow employee or supervisor, Title VII was not designed to remedy every instance of verbal harassment in the workplace. *Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 183 (4th Cir. 1998)*; *see Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)* ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."). Moreover, when such comments are infrequent, non-threatening, do not interfere with the employee's work performance, and largely go unreported by the employee, they do not amount to a hostile work environment within the meaning of Title VII. For these reasons, Plaintiff's claims of hostile work environment fail.

D. Count IV -- Constructive Discharge

In order to establish a claim for constructive discharge, Plaintiff must show that: (1) Plaintiff is a member of a protected class; (2) Plaintiff was qualified for his job and performed his job satisfactorily; (3) in spite of Plaintiff's qualifications and performance, Plaintiff was discharged, either actually or constructively; and (4) Plaintiff's position remained open to similarly qualified applicants after Plaintiff's dismissal. *Carter v. Ball, 33 F.3d 450, 458-59 (4th Cir. 1994).*

Defendant argues that Plaintiff cannot demonstrate that he was constructively discharged. A constructive discharge occurs when an employer creates intolerable working conditions in a deliberate effort to force the employee to resign. *Id. at 459; Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1350 (4th Cir. 1995).* The law does not support a finding of constructive discharge merely because an employee has been subject to a demotion. *Rankin v. Greater Media, Inc., 28 F.Supp.2d 331, 342 (D. Md. 1997).* However, a demotion can constitute constructive discharge "where the demotion is essentially a career-ending action or a harbinger of dismissal." *Carter, 33 F.3d at 459.* In order to demonstrate constructive discharge, Plaintiff must prove both the deliberateness of Defendant's actions and the intolerability of Plaintiff's working conditions. *Id.*

"Intolerability" is not established by merely showing that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign. *Blistein v. St. John's College, 74 F.3d 1459, 1468 (4th Cir. 1996).* Rather, an employee's working conditions are intolerable only where a reasonable person in the employee's position would have had no choice but to resign. *Id.* Here, Plaintiff argues that he felt compelled to resign rather than accept a demotion from Market Manager to Field Consultant because of the "stigma" such a demotion has in his culture. The Court finds that the stigma of a demotion is insufficient to establish intolerability. *See Rosado v. Garcia Santiago, 562 F.2d 114, 119-20 (1st Cir. 1977)* (loss of prestige insufficient to support a finding of constructive discharge).

Plaintiff also asserts that the demotion from Grade Level 25 to Grade Level 22 constituted a 50% reduction in pay and a severe loss of supervisory duties. As an initial matter, Plaintiff's salary was to be reduced by 28% -- not the 50% alleged by Plaintiff. Second, such a loss in pay would not compel a reasonable person to resign his position. It is undisputed that Defendant offered Plaintiff the next highest position available at the time of the reorganization, and indicated that Plaintiff would have almost immediately been eligible for a promotion to the newly-created position of Senior Field Consultant. Moreover, because Plaintiff was not demoted based on his inability to perform the duties of a Market Manager, but rather due to the downsizing of his specific role, a reasonable person would believe that Plaintiff would be highly competitive for promotion when a Market Manager position became available, particularly given the emphasis Defendant placed when interviewing for a promotion on prior relevant experience.

For these reasons, a reasonable person would view Plaintiff's demotion was not a career-ending action or a harbinger of dismissal, but rather as a temporary setback. Indeed, Plaintiff had previously endured a similar reorganization in 1992; he was briefly demoted, but was soon promoted and, over time, saw his career progress. As such, because a reasonable person in Plaintiff's position would not have been compelled to resign, Plaintiff cannot demonstrate constructive discharge.

IV. CONCLUSION

For all of the aforementioned reasons, Plaintiff has failed to demonstrate that he was subjected to racial

discrimination, retaliatory harassment, a hostile work environment, or was constructively discharged, within the meaning of Title VII. As such, the Court will GRANT Defendant's Motion for Summary Judgment and DENY Plaintiff's Cross-Motion for Summary Judgment [68]. An Order consistent with this Opinion will follow.

Date: December 17, 2004

Alexander Williams, Jr.

United States District Court

ORDER

Currently pending before the Court is Defendant's Motion for Summary Judgment [50] and Plaintiff's Cross-Motion for Summary Judgment [68]. For the reasons stated in the Court's December 17, 2004 Memorandum Opinion, IT IS this 17th day of December, 2004, in the United States District Court for the District of Maryland **ORDERED**:

1. That Defendant's Motion for Summary Judgment [50] BE, and hereby IS, **GRANTED**;

2. That Plaintiff's Cross-Motion for Summary Judgment [68] BE, and hereby IS, **DENIED**;

3. That the Clerk of the Court **CLOSE** this case; AND

4. That the Clerk of the Court transmit a copy of this Order to all counsel and parties of record.

Alexander Williams, Jr.

United States District Judge

Footnotes

n1 An "I" stands for "improves business," and is the highest rating. An "M" stands for "meets requirements." An "N" stands for "needs improvement," and is the lowest rating.

n2 Defendant notes that the position of Senior Field Consultant was not yet available, but that Sheikh would have been eligible to apply for the position of Senior Field Consultant on March 26, 2003, when the first vacancy for a Senior Field Consultant position was posted.

n3 There is some dispute between the parties as to whether the alleged mistreatment of foreign-born employees involved allegations of intentional discrimination. *See Peters v. Jenney, 327 F.3d 307, 320-21 (4th Cir. 2003).* Reading Plaintiff's affidavit in the light most favorable to Plaintiff, the Court finds that Plaintiff's raising issues of "fairness" is the equivalent of his raising issues of discrimination.

n4 Aithough the majority of Plaintiff's allegations concerning harassment by McWilliams seem to have occurred in 2001, Plaintiff is not always clear on this point. Therefore, the Court will take the allegations in the light most favorable to Plaintiff and assume that all of the allegations made by Plaintiff concerning McWilliams occurred post-2001.

n5 The Court notes that Plaintiff also makes a host of other allegations concerning hostile work environment, including allegations that foreign-born employees were bombarded with derogatory remarks, "required to be slaves and perform servant, menial, demeaning and

humiliating personal tasks for 7-Eleven managers and their families during the work and off duty hours without pay," and made to perform sexual acts for 7-Eleven managers. The these allegations, based primarily on the testimony of Deborah Van Lear ("Van Lear"), are either irrelevant to this case as they do not directly concern Plaintiff or are not detailed with any specificity. *See Carter, 33 F.3d at 461-62* ("General allegations do not suffice to establish an actionable claim of harassment."). The Court will thus consider only those allegations of harassment that actually affected Plaintiff.

No. 05-1075

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHIM S. SHEIKH,
Plaintiff –Appellant,

Versus

7-ELEVEN,
Defendant - Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on.the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Gregory, Judge Wilkinson, and Senior Judge Hamilton.

For the Court,
/s/ Patricia S. Connor CLERK
FILED November 1, 2005